

## CLS WASN'T KILLED BY A QUESTION

*John Henry Schlegel\**

More than a few years ago, my good friend Michael Fischl tried to answer “The Question that Killed Critical Legal Studies.”<sup>1</sup> He observed that the question, “What would you put in its place?,”<sup>2</sup> always offered in response to Critical Legal Studies’ critique of liberal legalism, reflected a mostly conscious strategy to avoid that critique by treating it as normatively, not structurally, offered. He also noted that the critics regularly, but incorrectly, assumed that our observation that liberalism regularly privileged individualist, not communitarian, alternatives meant that we were always in favor of the communitarian, often read as covertly socialist or totalitarian, alternative to existing legal norms.

Michael’s was a wonderful article, clear, cleanly argued, and funny. The problem that he was trying to address is intrinsic to any critique of an ideology. The hallmark of an ideology is its taken-for-grantedness. Ideologies never have an authoritative statement because they are “so obvious” to participants in it that they need not be stated. So, the initial task of any critic is to develop a clean statement of the ideology. Doing so always brings forth two objections: first, “no one has said that,” unfortunately both true and an indication that the critic has isolated an ideology; and second, “What would you put in its place?,” an invitation to enter the ideology, precisely what the critic does not want to do.<sup>3</sup> Michael wrote about the second of these objections, but CLS received a good deal of the first as well. Still, however accurate Michael’s understanding of the failings of CLS’s critics was, in retrospect it seems to me that his observations were beside the point. As an understanding *avant la lettre* of the slow fading away of the movement known

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\* Professor of Law and Roger and Karen Jones Faculty Scholar, State University of New York at Buffalo. This piece is for Wythe, whose steadfastness in the articulation of his understanding of the world of law/society gave unintended, but welcomed, steadfastness to mine. Fred helped, as always, this time by spotting a crucial omission, as did Laura, Lynn, Pierre, Bert, and participants in a faculty colloquium at Buffalo. As I wrote this piece, the first for the retirement of a contemporary, I was struck by how much I miss the assistance of Alan and Al in my writing projects and, concomitantly, how much I treasure the assistance of those other individuals, in both senses of that word, who for varying numbers of years have come to fill the discussions that take place at what is now my mostly metaphoric kitchen table.

1. Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 *LAW & SOC. INQUIRY* 779 (1992). Michael meant the title ironically, not presciently. Few people have taken it that way.

2. *Id.* at 780 (emphasis omitted).

3. Bert and I together worked out this understanding of ideology critique one evening when both of us were too tired to write.

as CLS,<sup>4</sup> the article ignored the peculiar rhythm of academic scholarship that David Trubek once made clear to me.

One time in the late 1980s, David and I produced a piece about American Legal Realist, Dean of the Yale Law School and later Second Circuit Judge, Charles E. Clark.<sup>5</sup> In one of our telephone conversations, I commented that I was worried that our hearty band of CLS legal scholars hadn't had a new idea in several years. He responded, "Quiet Schlegel. Someone might hear you." David's implicit understanding of the rhythm of academic scholarship is crucial to developing a similar understanding of the fading away of CLS. Unless one is a Copernicus, Newton, Darwin, or Einstein—and we were none of those—one needs to remember Andy Warhol's fifteen-minute rule, a rule that aptly describes his own career. To extend one's fame beyond the allotted time, one needs to have a nicely spaced series of new ideas. Without such, the academic butterflies will quickly shift their attention to the next pretty flower and the great Mississippi of scholarship will "jes keep[] rollin' alon'."<sup>6</sup>

So, CLS wasn't killed by a question; it simply drifted out of fashion for want of a "new look."<sup>7</sup> This is not for the lack of attempts to maintain our place in the academic top ten. Indeed, Duncan Kennedy still tries<sup>8</sup> and so does Pierre Schlag.<sup>9</sup> However, we haven't had a hit in twenty years, so I

4. A confession needs be made at this point. In the mid-1980s, I faded away from CLS's organized activities. At the time, I gave as my reason the assertion that the group had turned its attention away from an interest in theory and toward proselytizing. Possessing a visceral dislike of missionaries and an expanded family, it appeared to me to be sensible to focus my energies elsewhere. I now understand that what I took to be a cause of my fading away was an effect, probably wholesome, of the absence of attention to theory that I felt. We had no new theory to discuss.

5. See John Henry Schlegel & David M. Trubek, *Charles E. Clark and the Reform of Legal Education*, in JUDGE CHARLES EDWARD CLARK 81 (Peninah Petruck ed., 1991).

6. *Ol' Man River*, in SHOW BOAT, in MILES KREUGER, SHOW BOAT: THE STORY OF A CLASSIC AMERICAN MUSICAL 54 (1977). Of course some people would argue that there are no "next pretty flowers" in the garden of legal scholarship. I see no need to take a position on this question because clearly some legal academics believe that there are such flowers.

7. I have made two earlier, equally partial attempts to come to grips with the fading of Critical Legal Studies as a hot topic in legal academia: John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955 (2003) and John Henry Schlegel, *Of Duncan, Peter, and Thomas Kuhn*, 22 CARDOZO L. REV. 1061 (2001). Michael made the production of these two pieces easy and unintentionally provided the hook for this one. I thank him for his efforts and warm friendship. "No," you do not smell a book brewing.

A workshop presentation for colleagues at Buffalo reminded me of causes for the decline of the CLS movement other than the ones I have written about previously and the one I identify as central to my discussion here. There was a terrible problem with elitism among us and related problems of a certain social insularity, as well as of a fear that outsiders might undermine our project. We also suffered from a certain disciplinary backlash that caused tenure problems for younger participants and fellow travelers. Further, we lacked either an interest in dealing seriously with the problem of consciousness that our work raised or an ability to do so. And when rejecting the Enlightenment legacy in modern thought, we were unwilling to confront the possibility that we would also have to jettison the perfectibility of man and so reassert some version of the doctrine of original sin. Of course, none of these problems detracts from the fact that some of the ideas from CLS survive as part of the armament available to the legal scholar today, however diminished in potency these ideas may be. But the legacy of a movement is a different matter from its survival. As a coherent intellectual force in American legal thought Critical Legal Studies, like American Legal Realism, slowly disappeared like water into the sand.

8. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997).

9. See, e.g., PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998).

suppose that we now play mostly on the “Golden Oldies” stations. The nice thing about being a historian is that once the music hits those stations, one can call the reexamination of no longer popular tunes “scholarship.” So, I wish to examine one of the ideas—critical historical doctrinal scholarship—that didn’t keep us going, though not for want of trying, by looking at the very best defense of that idea: Robert W. Gordon’s elegantly written, graciously argued, *Critical Legal Histories*.<sup>10</sup>

Bob<sup>11</sup> spends the first forty-plus pages in the description and remorseless demolition of every variety of “evolutionary functionalism”: “notions about historical change and the relationship of law to such change” that assert that “the natural and proper evolution of a society . . . is towards the type of liberal capitalism seen in the advanced Western nations . . . and that the natural and proper function of a legal system is to facilitate such an evolution.”<sup>12</sup> Unpacked a bit, evolutionary functionalism asserts that there are separate but linked entities identifiable as “law” and “society,” that society has objective “needs,” and that legal systems adapt to those needs. Bob attacks this notion not frontally but through a recapitulation of other’s objections to the theory and their attempts to reconstruct it. Thus, he comments on the choice to treat objective needs as group interests, to loosen the relationship between legal responses and social needs, and to historicize and contextualize both social needs and legal consciousness. He concludes that “both needs and responses, and indeed the idea of needs-and-responses itself, must be seen as the cultural products of contingent modes of thought.”<sup>13</sup>

It is important to recognize that, by this point, Bob has done not just what Marx is supposed to have done to Hegel. He has not only turned evolutionary functionalism on its head but also has done a half twist, so it is now an apparently independent, contingent, human consciousness that establishes both social needs and legal responses. But this understanding still is not critical enough for Bob’s objectives. He adds another full twist by rejecting the distinction between law and society, by emphasizing the “fundamentally constitutive character of legal relations in social life,”<sup>14</sup> by finding law to be “[c]onstitutive of [c]onsciousness,”<sup>15</sup> and by stirring in both the fundamental contradiction and its intellectual dependent, the indeterminacy critique, so as to be able to conclude that, “if . . . law is founded upon contradictions, it cannot also be . . . that any particular legal form is required by, or a condition of, any particular set of social practices.”<sup>16</sup> Thereafter, Bob defends CLS’s “distinctive and exciting brand of doctrinal historiogra-

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10. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

11. At times like this I wish I were Bob Gordon. He could do so much better a job of summarizing his own or someone else’s thought than I ever will be able to do.

12. Gordon, *supra* note 10, at 59.

13. *Id.* at 100.

14. *Id.* at 104.

15. *Id.* at 109.

16. *Id.* at 116.

phy”—“thickly described accounts of how law has been imbricated in and has helped to structure the most routine practices of social life.”<sup>17</sup>

*Critical Legal Histories* was a really bravura dive off the intellectual ten meter platform. Yet there were two peculiar things about the article.<sup>18</sup> The most obvious peculiarity was Bob’s choice to retain to the end the assumption that a truly functionalist account must assert a positivist’s necessary relationship between need and response.<sup>19</sup> This choice was troubling for two reasons. First, it was logically dubious since a response may be functional but not necessarily, and even unintentionally, so. The great weakness of evolutionary functionalism was not the assertion that social practices including law have functions, but that these practices have a necessary relationship to the problem or situation that they are supposedly responding to.

A classic example that both recognizes the contingency of “needs” and “responses” and the possibility that a response can be functional is to be found in the requirements of the Securities Act of 1933 that new issues of securities be registered and that their sale be accompanied by a prospectus.<sup>20</sup> It is not clear exactly what the need for this legislation was. Among the candidates can be included increasing the willingness of investment banks to underwrite securities issues and increasing the willingness of investors to purchase the securities being issued. Though, in truth, it was mostly an angry response to earlier bad practices in the industry. It is exceedingly doubtful whether the Act was functional with respect to either “need.” Section 11 of the Act imposed a liability on underwriters<sup>21</sup> that, if anything, would have deterred the investment banks from offering securities. Prospectuses are by and large not read, so the existence of such documents is not likely to have increased the willingness of investors to open their wallets.

A much more effective piece of legislation would have backed securities issues with a federal guarantee. Nevertheless, over time the legislation has been modestly effective, i.e., functional, in moving the weakest, most dubious, or even outrightly fraudulent issues away from the national securities market and consolidating them in more local, backwater markets. This regional shift probably had the effect of, i.e., was functional for, increasing the reputation of the large eastern firms and so marginalizing the more local firms, which probably resulted in increasing the national penetration of these eastern firms and so of the reach, and concomitantly the depth, of the market for large, new issues. Could one have accomplished this end otherwise? Surely, a requirement that all persons offering securities possess a

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17. *Id.* at 125.

18. It is important that at this point I note that Bob asked for my comments on his piece when it was in draft and thanked me for my efforts in the \* note to the published version. Much of what follows tracks my comments to him then, though cleaned up for public presentation. Our differences about these matters are old and treasured. Still, “[s]peech after long silence; it is right.” W.B. Yeats, *After Long Silence*, reprinted in 1 THE COLLECTED POEMS OF W.B. YEATS 304, 304 (1938).

19. I use “choice” advisedly. Bob recognized that some CLS scholars did not look at functionalism in this way. See Gordon, *supra* note 10, at 61 n.11.

20. See 15 U.S.C. § 77e (2000).

21. See *id.* § 77k.

high minimal amount of capital would likely have brought the same result. But what was done was functional toward this end, just as a heavy crescent wrench, while not designed for the purpose of hammering a nail, will do that task reasonably well—at least if the nail is small enough.

Second, Bob's choice to retain to the end the assumption that a functionalist account of law must assert a positivist's necessary relationship between need and response was troubling because it relegated those CLS scholars who saw a world filled with contingent functional responses to the land of not sufficiently thorough, i.e., partial, instrumentalist critiques, to a building away from the main house as it were. This choice engendered a certain amount of hard feelings among scholars who saw things this way—not a good result in a group that, although portrayed in the law school world, and eventually the national press, as an advancing horde, was in fact quite small. Moreover, a defense of the constitutive role of legal norms in social life, and so of the kind of doctrinal scholarship that Bob wished to trumpet, did not require any particular resolution of the question of law's functionality. Logically, law might have been constitutive and necessarily functional, constitutive and not necessarily functional, or constitutive and not functional at all. The claim for constitutiveness did not rise or fall based on the position taken with respect to the functionality of law's response to social life. Perhaps the argument for constitutiveness was cleaner, and so easier to make, from the assumption that functionality assumed necessity. But, beyond such considerations, it is hard to see why those CLS adherents who didn't see things that way needed to be relegated to the out buildings.<sup>22</sup>

The other peculiar aspect of *Critical Legal Histories* is both less clear on the text and less socially problematic than Bob's choice to retain to the end the assumption that a functionalist account of law must assert a positivist's necessary relationship between need and response. It can be illuminated with the aid of a little story. In the same issue of the *Stanford Law Review* that Bob's piece appeared, I innocently, but apparently infamously, stated, "LAW IS POLITICS."<sup>23</sup> About ten years later, Pierre Schlag asked me whether everyone knew that this assertion, common among CLS types, implied that POLITICS IS LAW. I responded to the effect that, as a onetime student of mathematics, I knew of the "symmetric property of equality," but I had no idea what anyone else knew. Now, I do not wish to suggest that Bob did not know his math, but it seems to me that if law is constitutive of consciousness and law and society cannot be distinguished, then society is equally constitutive of consciousness. Similarly, if law is imbricated in society, then society is imbricated in law. Given this symmetric relationship, Bob ought to have concluded that thickly described doctrine was only half of the story. At the least, thick description needed to be done on both sides

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22. Bob denies that this relegation was his intent. I am sure he is correct. However, mine is not a question of intent but of effect. Some of us felt that we had been sent to the out buildings. I was but one.

23. John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 411 (1984).

of the intentionally collapsed divide between law and society. However, Bob chose not to see it so.

I suppose that to ask why Bob made the choice to focus only on necessary functionality and to treat the constitutive nature of law as not requiring parallel thick descriptions of legal consciousness and social practice is in some sense to undermine the critical historical project as he saw it. Still, similar considerations have never stopped me before, so I see no reason to let them stop me now. Bob adverts to several reasons for his choice in his text. Doctrine is easy for law professors to research because it is at hand and the resulting scholarship will easily find a place in class discussion. Moreover, as the socio-legal studies types have had little impact on the law schools and critical study of doctrine has “stirred up a fabulous ruckus,”<sup>24</sup> continuing the enterprise<sup>25</sup> is a good thing. He might also have noted that the ad-hocing of functionality is one of those things that law professors do easily, but badly, even uncritically, and thus should never be approved of. Lurking below these considerations is Bob’s dissatisfaction with the “apologetic aspects” of socio-legal studies in the Realist vein.<sup>26</sup> And then there surely was an unwillingness to criticize in print the work of the large portion of the historians who identified themselves with CLS, the obverse consideration of the one I explored earlier with my metaphor of relegation to an out building.<sup>27</sup>

A more hidden aspect of Bob’s choice, I suspect, is this. In the late 1970s and early 1980s, there was still a real fear of orthodox, determinist Marxism abroad in the land and, as Fischl adverted to in his article, “red baiting” was not an uncommon practice, even in academia.<sup>28</sup> Regularly, academics on the left attempted to distance themselves from such fear and accompanying hostility. Indeed, the critical part of CLS comes from the already distanced Critical Marxism of the Frankfurt School that, with an admixture of Derrida, Foucault, and various structuralisms, was beginning to turn into Critical Theory, a language that Marx would have abhorred. Even in the most liberal parts of the academic legal world, Marx meant Lenin; Lenin meant Stalin; Stalin meant the purges and gulags; and Stalin’s successors meant a possibly technologically advanced economy as part of a society even more repressive than our own. In such circumstances, one can understand an aversion to a deterministic vision of social relations coming

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24. Gordon, *supra* note 10, at 122.

25. Though why focused on the “core doctrinal subjects of the first year curriculum” escapes me. *See id.*

26. *Id.* at 70.

27. There were also conflicting impulses on the society/social practice side as well as the law/legal consciousness side that would have been a bear to negotiate. While one can simplify the potential disputes to materialism v. idealism, this dichotomy is only roughly useful. Participants in CLS supported differing varieties of structural explanation on both sides of the dichotomy, as well as differing varieties of material/cultural explanations. There was the burgeoning fight between modernists and post-modernists. And there were the emerging feminist and critical race essentialisms in the offing. It was not stupid to avoid these disputes.

28. Fischl, *supra* note 1, at 799 n.47, 800.

from the left, given that, on top of everything else, the traditional Marxist determinism already seemed not to have panned out.

As Bob wound his argument down, he offered both an evaluation of the work of the CLS historians whose work he wished to laud and a prediction of the results of their work. Respectively they went: "I love the work that the Critical doctrinal historians have been doing. I think it's among the most exciting intellectual work being done anywhere and that it has revolutionized our vision of our legal past."<sup>29</sup> And, "I predict that the forces of the orthodox will simply abandon their traditional doctrinal ground to the Critics, claiming that 'it doesn't matter anyway, because it doesn't have anything to do with the real world.'"<sup>30</sup>

Bob's evaluation has proven to be remarkably correct. The historical work of this part of the CLS crowd, indeed of the entire CLS crowd, has, over time, turned out to have the most lasting influence of any of our work, especially among historians. Citations abound and the corpus continues to grow. However, his prediction was as wrong as can be—not that any of mine ever turn out to be right either. Doctrine remains central for scholar/teachers in the legal academy. Yet, most of these individuals ignore CLS historical writing while they work within some version of evolutionary functionalism in their classrooms and scholarship. Just why is it that the CLS historical scholarship that has been so successful among historians has not been equally successful among law professors? Answering this question may help to explain why *Critical Legal Histories* was not the next big idea that CLS needed in order to avoid being taken to have died for want of an answer to a simple question.

What made Bob's idea not the intellectual equivalent of either of the two notable CLS ideas—the indeterminacy critique and the critique of rights? One weakness is simple to understand in retrospect, though we in CLS did not see it at the time. To focus historical scholarship on doctrine was to invite the question—"What would you put in its place?"—that Fischl explicated in his article. Whatever we meant to be doing as we explicated doctrine, then as now, in the legal academy doctrinal analysis is understood as normative statement. Descriptive doctrinal work is treatise writing. That our scholarship asserted its descriptive nature was to many people an implausible proposition since, whatever we were doing, it was not treatise writing. Thus, it was easy for liberal or conservative law professors to see our self-described critique as covertly normative but lacking in the prescriptive dimension that always accompanies liberal legalist<sup>31</sup> scholarship. After

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29. Gordon, *supra* note 10, at 122. This is only the first time Bob has uttered such an observation. More recently he called a later, slightly different movement in legal history, perhaps "the most exciting work currently being done on law." See Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1029 (1997). Bob's public generosity towards new work is to be treasured.

30. Gordon, *supra* note 10, at 122.

31. Laura regularly chides me for this locution, as well as its companion, "liberal legalism." The implicit reference in both phrases is to JUDITH SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1964). That reference still seems apt. "Legal liberalism," Laura's locution for what Pierre

all, criticism of existing doctrinal norms is the first move in most any piece of such scholarship. So, the doctrinal focus that was supposed to make our work accessible played into our opponent's frustration that we were criticizing their edifice—after all, we called our work an internal critique—but not playing by their rules. Like a prizefighter who jabs quickly and then dances away, we brought forth an endless stream of complaints that we were unwilling to “stand there and fight like a man.”

The other weakness seems to me to be more complex. Start with the proposition just now offered—the form of CLS doctrinal history made it easy for its detractors to mistake our work for a coy version of the normative legal scholarship that endlessly fills the law reviews. The obverse side of this coin can then be reasonably inferred. This scholarship looked like standard legal scholarship. It was not by its form distinctive. Unfortunately, in any academic dust-up, distinctiveness matters.

The other two big ideas of CLS were quite distinctive. The indeterminacy critique, while hardly original, had not been put as bluntly as we put it for years. It asserted that the common judicial and law review activity, reasoning by analogy—more grandiosely known as “thinking like a lawyer—could never meet the criteria for legality established by the liberal legalist notion of the rule of law. Rules could not constrain legal action in and of themselves. Pound's taught tradition, the limitations of vision that accompany capitalism, party/partisan political imagination, all of the above, or something else constrained choice—this was a multiple choice test—lent a “tilt,” in Wythe Holt's felicitous phrase,<sup>32</sup> to the outcome of legal argument. To suggest that the rule of law needed shoring up was a big deal.

The critique of rights, while a less fundamental an attack on liberal legalism, was still quite striking a claim. The idea that rights were an example of the theory of the second best undermined almost all of contemporary constitutional law and might have been extended to a large portion of civil law following on Stewart Macaulay's famous piece, *Non-Contractual Relations in Business: A Preliminary Study*.<sup>33</sup> Constitutional law is most often told as the story of the struggle for rights. Rights is the language of public discourse—abortion rights, children's rights, civil rights, contract rights, gay rights, intellectual property rights, plain old property rights, taxpayer's

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Schlag called “normative legal thought,” see, e.g., Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 811 (1991), has always seemed to be too tied to solving problems through legal process and so is a species of legalism, as Shklar understood it. Processual norms are fine if that is the best that one can do, but having the community support and understanding that make legal norms unnecessary, because taken for granted, is still better. And so Grant Gilmore's famous observation, “In Hell there will be nothing but law, and due process will be meticulously observed,” still seems a good answer to the faith in law and legal process that is at the heart of legal liberalism. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977). And then there is the fact that, for us, “liberal” and “liberalism” was not a political stance to be distinguished from “conservative” and “conservatism” but a political philosophy to be distinguished from the various species of both autarchy and communitarianism. For us, her locution simply could not work.

32. Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280 (1984).

33. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

rights, women's rights, worker's rights—all resound with the feel of law's achievements. We even know numbered rights—First Amendment rights, Second Amendment rights, etc. To suggest that community solidarity trumped some people's rights and so made other's rights unnecessary was to undermine the normative discourse of law quite directly.

In contrast, to suggest that doctrinal history and analysis would allow one to understand the way that law privileged one or another outcome was not a very big claim. To make an equally big claim for historical scholarship, one would have had to argue that the constitutive nature of the relationship between law and society meant that to understand law, even to do normative legal scholarship, one would have to thickly and extensively describe both doctrine and social practice. That claim would have gained CLS a certain amount of attention, as it would have undermined the doctrinally normative simplicity, as well as the empirically hypothetical thinness, of all legal scholarship, including this piece.

Thus, fusing internal and external critique would have been a tour de force, except no one in CLS had ever carried it off—to Bob's satisfaction at least. Not being a fool, Bob knew that to have advocated a standard for scholarship without an example of such work that he was willing to stand by would have been seen as the equivalent of suggesting the design for a bridge to be built somewhere, some time, but not by me or my friends, hardly an action to be taken seriously. Even, had Bob been willing to accept the risk of seeming foolish, the choice to follow out mutual constitutiveness in this way surely ran the risk that it would tend to emphasize the distinction between normative legal scholarship and law and society scholarship that we in CLS were trying to obliterate. Such reinforcement might not have helped the CLS cause.

The difficulty of taking such a risk was compounded by the knowledge that establishing academic distinctiveness depends on a firm delineation of what one is not. In our case, what we in CLS were not were scholars participating in the Law and Society movement whose work at that time was defined by the endless repetition of research designed to show the gap between law on the books and the law in action.<sup>34</sup> To have invited social empiricism into the fold, even social empiricism divorced from the obsession that is “gap” studies, would have risked loss of brand identity—never a good thing for a young academic movement. And so Bob chose to privilege one type of scholarship over another, rather to attempt to fuse them both—or so it seems to me.

All this said, I've never been convinced that CLS didn't have adequate examples of historical work that thickly described both sides of the inten-

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34. It is modestly ironic that it was at just this moment that Law and Society studies began its shift from “gap” studies to the more interpretive, consciousness-centered work that dominates that field today. See, e.g., David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1981).

tionally collapsed divide between law and society. My buddy Fred Konefsky's work on Daniel Webster<sup>35</sup> and a later piece on early nineteenth century elites<sup>36</sup> surely tried to make this idea work. Others did too. But the person who tried hardest was Wythe. True, his unrepentant, even proud Marxism did not make his efforts attractive to many in the academic world. However, his two pieces on nineteenth century labor law, the first on the early labor conspiracy cases<sup>37</sup> and the second on the problem of the recovery by the employee who quits before the end of his or her "contractual" term of employment,<sup>38</sup> seem to me to do an excellent job of both showing the loose structural potential of the relevant doctrine and the deep contours of the social world of the judges, as well as of the workers and employers. True, Wythe always saw the endless interplay of doctrine and context that he called dialectical as leading more likely than not toward one doctrinal and social result. But that is quite a different thing than a position that everywhere sees the inevitability of the immiseration of the working class. And anyone who has talked with him over the years knows that Wythe is as inventive as anyone of us when it comes to identifying doctrinal possibilities leading to alternative outcomes more consistent with his work on behalf of the "party of humanity."<sup>39</sup>

Was Bob's choice a mistake? At the least, Bob should not be faulted for not focusing on Wythe's labor law work because it was published after *Critical Legal Histories* was written. But what might be the case if one puts aside the question of available models of CLS work? I would be hard pressed to call Bob's choice a mistake. Even in a world of significant social and intellectual contingency, it is impossible to say that the safe bet is a mistake. Among other things, the pitch of the playing field was always against us. To have had a ten-year run against that pitch is an amazing achievement. Perhaps no new idea could have continued that run or could have kept us such a distasteful morsel that the "wad"—the great Borg-like apparatus of liberal legalism—could not have assimilated CLS as just another tempting perspective on law.<sup>40</sup>

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35. THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS (Alfred S. Konefsky & Andrew J. King eds., 1982) (2 volumes).

36. Alfred F. Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988) (book review).

37. Wythe Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOODE HALL L.J. 591 (1984).

38. Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 WIS. L. REV. 677.

39. A phrase for which Wythe always cites Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984).

40. And this is exactly what happened to CLS. Liberal legalism mutated slightly, shifting to a softer form of policy analysis based upon a weakened understanding of the constraint that the rule of law places on legal action, a shift that has angered conservative academics but not brought them to open revolt. Adopting a weaker version of the rule of law constraint blunts the force of the indeterminacy critique. Pierre suggested this observation to me.

Still, I believe Bob's choice was an intellectual error. The answer implied by the symmetric property of equality was and is the correct one. Both law and society are constitutive of consciousness. Both are imbricated in law. Thick description needs to be done on both sides of law/society. So, it would be a lie for me not to admit that I wish that Bob had put his money on the long shot, just as I wish that Duncan had not placed the safe bet by working to expand our crew, bringing students into our hearty band, rather than wrestling some more with theory. My wish to extend our run on the legal equivalent of the Billboard charts the hard way, by playing ever more difficult music, of course, explains in part why I am here today.<sup>41</sup> In post-World War II American academic life generally, anything smacking of Marxism was, and remains, a true long shot. In law it is all but a scratch. And yet for almost forty years, Wythe has remained true to his vision when the odds were clearly against him. His strength of intellectual purpose and willingness to stand alone as witness to the truth as he sees it is an object lesson for us all who dodge and weave in the name of some supposedly higher purpose. Academic life will be poorer for Wythe's retirement, and it is important to be here today to say so.

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41. The other part needs be noted. Wythe is a gracious southern gentleman of the old school. He has never allowed conversation in the presence of my musician wife to stray into territory that would leave her feeling excluded. And unlike several of my northern friends, he has never had to be told that any other behavior was unacceptable.